Supreme Court, U.S.
FILED
113 D
08-739 DEC 5 - 2008
OFFICE OF THE CLERK

No. 08-___

IN THE

Supreme Court of the United States

MALCOLM E. MCVAY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

THOMAS J. SPINA
FAWAL & SPINA
1330 21st Way South
Suite 200
Birmingham AL 35205
(205) 939-1330

SAM HELDMAN *
THE GARDNER FIRM, PC
2805 31st St. NW
Washington, DC 20008
(202) 965-8884

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether the Court should summarily reverse the decision below, on the grounds that the Court of Appeals committed the same error that this Court identified in *Gall v. United States*, ___ U.S. ___, 128 S.Ct. 586 (2007): the error of substituting its own subjective sentencing judgment for the experience-based judgment of the District Court.

2. What (if any) empirically- or legally-derived basis must a federal appellate court have, beyond its own intuition that the sentence should be more or less severe, before the court can reverse a sentence as substantively unreasonable under *Gall*?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
A. The facts	2
B. The course of proceedings below	7
REASONS FOR GRANTING THE PETITION	9
CONCLUSION	21
APPENDIX	
APPENDIX A	1a
APPENDIX B	4a

TABLE OF AUTHORITIES

CASES Page

Gall v. United States, ___ U.S. ___, 128 S.Ct. 586 (2007) ..... i, 10-15, 18-19, 21
Kimbrough v. United States, ___ U.S. ___, 128 S.Ct. 558 (2007) 10, 11, 15
Rita v. United States, ___ U.S. ___, 127 S.Ct. 2456 (2007) 10, 11
United States v. Booker, 543 U.S. 220 (2005) 7, 9, 10, 20
United States v. Gardellini, ___ F.3d ____, 2008 U.S. App. LEXIS 23911 (D.C. Cir. 2008) 19
United States v. Howe, 543 F.3d 128 (3rd Cir. 2008) 19
United States v. Martin, 455 F.3d 1227 (11th Cir. 2006) 2
United States v. McVay, 447 F.3d 1348 (11th Cir. 2006) 7, 8, 13, 17
United States v. Thurston, 544 F.3d 22 (1st Cir. 2008) 18-19

STATUTES AND SENTENCING GUIDELINES

18 U.S.C. § 3553, ... 8-9, 11-15, 17
18 U.S.C. § 3561 13
28 U.S.C. § 1254 2
U.S.S.G. § 5B1.1 13
U.S.S.G. § 5C1.1 13
U.S.S.G. § 5K1.1 ..... 4, 7, 8, 14

OTHER AUTHORITIES

Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1 (1988) 16

TABLE OF AUTHORITIES—Continued

Page

Parker and Block, *The Limits of Federal Criminal Sentencing Policy: or, Confessions of Two Reformed Reformers*, 9 Geo. Mason L. Rev. 1001 (2001)..... 17

IN THE

Supreme Court of the United States

No. 08-___

MALCOLM E. MCVAY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Malcolm E. McVay respectfully requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Eleventh Circuit, dated September 19, 2008, in *United States v. McVay* (11th Cir. No. 07-11264).

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced in the Appendix at 1a-3a. The Court designated the decision as "unpublished," but it is available at 2008 U.S. App. LEXIS 20820 and at <http://www.ca11.uscourts.gov/unpub/ops/200711264.pdf>. The transcript of the sentencing, in the United States District Court for the Northern District of Alabama, is reproduced in the appendix at 4a-33a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Eleventh Circuit's decision issued on September 19, 2008.

STATEMENT OF THE CASE

Petitioner Malcolm "Tadd" McVay was a short-term participant in a large-scale accounting fraud conspiracy at HealthSouth Corporation. He pleaded guilty to a federal information. And in order to make up for his offenses, McVay assisted the Government in its HealthSouth investigation and prosecutions, in ways that were indisputably extraordinary.

Two United States District Judges have agreed on the appropriate sentence for Mr. McVay: six months of home detention, five years of probation, a fine and forfeiture. Yet the Court of Appeals has substituted its own judgment for that of the two District Judges. And the Court of Appeals has done so without any support, either in fact or in law, beyond its own bare intuition that the sentence chosen by the two District Judges is inadequate under 18 U.S.C. § 3553.

A. The facts.

The accounting conspiracy at HealthSouth was a large and lengthy one. It spanned at least nine years, involved many participants, and included overstatement of corporate earnings by billions of dollars. *U.S. v. Martin*, 455 F.3d 1227, 1230 (11th Cir. 2006).

McVay's involvement, however, was much shorter and narrower than the conspiracy as a whole. That was the finding of the District Court. The prosecution did not object to it, and the Court of Appeals did not claim that the finding was erroneous. This was

the extent of McVay's offense conduct: Having just recently been made Chief Financial Officer of HealthSouth, McVay signed the form 10-Q (a financial statement) for the third quarter of 2002. He did this, although he knew that the material on that form was incorrect in certain respects based on irregularities in the numbers from prior quarters.

As the District Court found, he "had been in his position as CFO less than 1 month when he was presented with a document to sign which he had learned contained false information." [25a]. "There is no dispute from anybody that the defendant did not know about it [i.e, accounting fraud] until he was told as CFO to sign the quarterly report, and he did not know about it until Mr. Harris told him about it right after he became CFO." [26a].

The District Court's findings of fact continued:

> More specifically I find, however, that it was the attachments to the document, not the document that he had helped prepare, which contained the false information. He had no knowledge of the amount of misstated funds but was advised not only by Emery Harris to sign the document, but by Mr. Scrushy as well.
>
> Actually, if I understand completely correctly what was said in the plea transcript, he talked to Mr. Harris about it at the time he was about to sign the document when Mr. Harris told him that the attachments contained some false figures, and he talked to Mr. Scrushy afterwards about it.
>
> This one act, the signing of the quarterly report, comprised the whole of his involvement in this lengthy and broad conspiracy. He was not a

> member of the family that we have heard so much about and has never founded and prolonged the fraud, nor did he attend the family meetings. Not many months after signing the one and only document, the defendant was removed from his position as CFO and at no time did he direct anyone in furtherance of this conspiracy.

[25a].

The District Court also noted, and relied on, evidence that McVay was in fact very careful not to generate fraudulent financial data himself or to allow those working under him to do so. Thus McVay, during his short tenure as HealthSouth's CFO, was fighting back against the corruption in the company. He "stood firm" even against any efforts to "push the envelope" with respect to financial accounting; and (unlike his predecessors as CFO) he actively protected those under him when they received pressure from higher-ups to engage in questionable accounting. [27a].

In contrast to the ultra-limited nature of his offense conduct, McVay's assistance to the Government has undisputedly been exemplary and extraordinary. In its original motion for a downward departure under Guidelines § 5K1.1, the Government stated as follows:

> The defendant has provided substantial assistance in the investigation and prosecution of persons who perpetrated the massive accounting fraud at HealthSouth.
>
> From the discovery of the defendant's participation in the conspiracy, the defendant has truthfully and completely confessed his misdeeds. The

defendant has also revealed, without hesitation, what he knows about the participation of others in the scheme.

...

The defendant has been available on a continuous and regular basis and met whenever needed, with representatives of the United States, HealthSouth, and the forensic auditor reconstructing HealthSouth's books and records. The defendant has provided invaluable assistance in helping the United States, HealthSouth, and the forensic auditor discover, in an expeditious manner, the varied ways in which the fraud was conducted. As part of the defendant's assistance to the United States, he has spent many hours reviewing financial statements and numerous other documents.

Specifically, the defendant has helped explain specific transactions, and has provided information implicating several other culpable individuals. Defendant has provided both general and specific information which has been of assistance to the investigation. The general information has included information on HealthSouth's relationships with Wall Street analysts and banking institutions. Defendant has also assisted the United States by detailing parts of publicly filed financial statements that contained materially false information. Further, the specific information has included evidence of direct conversations with those that directed the fraud about topics such as possible methods for dealing with, continuing, and covering up the fraudulent scheme. The defendant's assistance has facilitated both the securing of guilty pleas from other co-con-

> spirators and the prosecution of other individuals yet to be convicted. Information provided by the defendant has also corroborated information by other individuals who have independently assisted the investigation. The information provided by the defendant, to the best of the government's knowledge, has been truthful and accurate.
>
> The defendant's immediate cooperation has allowed the HealthSouth case to be prosecuted at a pace which, on a relative basis, constitutes swift and efficient of the United States' criminal laws. Further, the details of the fraudulent scheme were exposed to the public shortly after the discovery of the fraud due, in part, to the defendant's cooperation. Such actions by the United States helped reassure the nation's financial markets in the wake of the scandal and has contributed to HealthSouth's ability to begin its recovery.

Even after his original sentencing, Mr. McVay continued to assist the Government tremendously. In the Government's own words, he:

> remain[ed] available on a continuous and regular basis and met whenever needed with various agencies of the United States, including the FBI and the Securities and Exchange Commission, each of which had a substantial need for his assistance.
>
> In addition, the defendant met with prosecutors on at least ten occasions during December 2004, and January and February 2005, in extensive preparation for his testimony at the trial of the former CEO of HealthSouth; each of these occa-

> sions lasted approximately three to four hours. The defendant also spent substantial time reviewing financial documents on each of four or five other occasions. In March 2005, the defendant testified for two days on behalf of the government at the criminal trial of the former CEO of HealthSouth. The information defendant provided to the government as well as his testimony at trial, to the best of the government's knowledge and belief, have been truthful and accurate.

The District Court accepted and relied upon the Government's glowing description of Mr. McVay's assistance. [21a].

Furthermore, the District Court heard – and quite obviously took into account – a heartfelt apology and allocution from Mr. McVay himself. [14a-15a].

B. The course of proceedings below.

Mr. McVay pleaded guilty to an information in 2003. Because he substantially assisted the Government in its investigation and prosecutions of other HealthSouth officials, as noted above, the Government filed a motion for downward departure under U.S.S.G. § 5K1.1. *U.S. v. McVay*, 447 F.3d 1348, 1350-51 (11th Cir. 2006) ("*McVay I*").

The first sentencing took place before this Court decided *United States v. Booker*, 543 U.S. 220 (2005) (holding Sentencing Guidelines to be advisory only). The District Court granted the Government's § 5K1.1 motion, and sentenced Mr. McVay to six months' home detention with electronic monitoring, a fine of $10,000, forfeiture of $50,000, and probation for five years.

On the Government's appeal, the Court of Appeals vacated the sentence and remanded for resentencing. *McVay I*, *supra*. The Court held that the District Court had taken account of things that it should not have taken account of, under § 5K1.1; and the Court also held that further explanation was required for the extent of the § 5K1.1 departure. *McVay I*, 447 F.3d at 1355-56.

The second sentencing took place after *Booker*, before a different District Judge (Johnson, J.). The Government renewed and supplemented its motion for downward departure under § 5K1.1.

Judge Johnson began with an advisory Guidelines level of 29 [6a], as the Court of Appeals recognized was appropriate in *McVay I*. 447 F.3d at 1353 n.3. Judge Johnson granted the Government's renewed motion for downward departure. [6a]. She explained her decision as to the proper extent of the § 5K1.1 departure, arriving at an advisory level 17. [23a]. This was the departure that the Government had requested in its renewed § 5K1.1 motion.

Judge Johnson then explained her findings and her decision as to the actual sentence, under 18 U.S.C. § 3553 and the *Booker* discretionary authority. [24a-28a]. She ultimately decided to reimpose the original sentence, concluding that "extraordinary facts of this defendant's assistance and the facts related to 3553(a) factors justify a substantial variance from the sentencing guideline range as determined with the departure." [28a]. So, she reimposed the original sentence: 6 months of home detention, $10,000 fine, $50,000 forfeiture, and 5 years' probation. [28a-29a]. Thus two separate District Judges had agreed that this was the sentence that 18 U.S.C. § 3553(a) has always demanded: the sentence that is "sufficient,

but not greater than necessary, to comply with the purposes set forth in" § 3553(a)(2).

The Government appealed the sentence once again. The Government did not claim that the District Court had made any procedural error. The Government did not claim that the District Court relied on any impermissible sentencing factor. The Government did not claim that the District Court misunderstood the governing legal standard. The Government, indeed, said in its brief to the Court of Appeals: "Judge Johnson carefully reviewed and assessed the § 3553(a) factors at sentencing." (Opening Brief of United States as Appellant, p. 17). Instead, the Government took issue with the bottom-line conclusion, and argued that the sentence needed to be more severe in order to further some of the purposes set forth in 18 U.S.C. § 3553.

In a brief *per curiam* opinion, the Court of Appeals vacated the sentence and remanded for yet another (third) sentencing. The Court declared, in language that was both cursory and conclusory, that the sentence was too short to meet some of the purposes in § 3553. Repeatedly describing the sentence with the one word "probation," and declining to mention the home detention as well as the fine and forfeiture, the Court insisted that a proper sentence for Mr. McVay must include incarceration.

As we will show, the Court of Appeals has given free rein to its own intuition, in a manner that is unsupported by fact and that is contrary to law.

REASONS FOR GRANTING THE PETITION

In *Booker* this Court held that the former mandatory-Guidelines system was inconsistent with the Sixth Amendment; and as a remedy, the Court held

that the Guidelines were only advisory. *Gall v. United States*, ___ U.S. ___, 128 S.Ct. 586, 594 (2007). At sentencing, a federal District Court is no longer bound to sentence only within the Guidelines range. Instead the District Court is to impose the sentence that it deems appropriate after considering both the Guidelines and the various factors listed in 18 U.S.C. § 3553(a). *Gall*, 128 S.Ct. at 596-97. That is, undisputedly, precisely what the District Court did in this case. There is no claim of procedural error by the District Court here, and no claim that the District Court misunderstood the governing law. There is only the claim, by the Government and by the Court of Appeals, that the sentence which two different District Judges agreed to be appropriate was *substantively* not severe enough.

In post-*Booker* decisions, this Court has developed the twin themes of sentencing in the advisory-Guidelines era: (1) deference to District Courts' experience and judgment, along with (2) a continuing recognition of the value of empirically-derived knowledge, which can lead to wiser and less divergent sentencing practices overall. A robust appreciation for District Court discretion – the discretion to choose a sentence that the District Court deems appropriate for the unique individual case – is what makes the system constitutional under *Booker*. But at the same time there is some limited room for appellate courts, using the wisdom that the Sentencing Commission accumulates through empirical study of nationwide sentencing practice, to correct sentences that deviate unreasonably from mainstream judicial practice. Those are the lessons of *Gall*, of *Kimbrough v. United States*, ___ U.S. ___, 128 S.Ct. 558 (2007), and of *Rita v. United States*, ___ U.S. ___, 127 S.Ct. 2456 (2007).

An implicit corollary from these themes, which in itself is dispositive of this case, naturally follows: A Court of Appeals cannot reverse a sentence based only on its own inexpert intuition that the sentence fails to meet some of the purposes set forth in § 3553. A Court of Appeals must have something more than its own gut feeling, in order to hold a sentence substantively unreasonable. We believe that this corollary is so self-evident from *Gall*, *Kimbrough*, and *Rita*, and its application so straightforward here, that a summary reversal is appropriate. But if there is any doubt about it, then the case presents an important and recurring issue of sentencing law that the Court ought to consider in full.

Here, the Court of Appeals literally had nothing more than its own subjective judgment – in other words, a mere intuition of its own – to support the pronouncement that the sentence was unreasonable. The core of the appellate court's reasoning was its belief that a sentence without a period of incarceration is simply too lenient for Mr. McVay's offenses – regardless of the particular facts about his involvement in the offenses, regardless of his stellar assistance to the prosecution, regardless of other facts about his life, and regardless of the fact that he was punished by (among other things) six months of home detention.

The Court of Appeals thus committed the same error that this Court corrected in *Gall*. While briefly paying lip service to the concept of sentencing court discretion, the Court of Appeals did not meaningfully apply that concept. Instead the Court of Appeals used its own judgment, effectively on a *de novo* basis. The Court of Appeals merely postulated its own judgment as to whether the sentence was sufficient

for various purposes under § 3553. It did not, in any real sense, treat the judgment of two District Judges as something that must even be taken seriously – much less as something to receive a due degree of deference. The very brief, conclusory, opinion by the Court of Appeals merely stated that Court's own view; it did not even address the District Court's view with any modicum of respect.

This is not merely our disappointed description of the decision by the Court of Appeals; instead we believe that it is plain on the face of the decision. We respectfully ask this Court just to read the opinion. It will take one or two minutes at most. We respectfully submit that, after that, practically every reader will agree that the words that this Court used in *Gall* are therefore every bit as applicable here.

> The Court of Appeals gave virtually no deference to the District Court's decision that the § 3553(a) factors justified a significant variance in this case. Although the Court of Appeals correctly stated that the appropriate standard of review was abuse of discretion, it engaged in an analysis that more closely resembled de novo review of the facts presented and determined that, in its view, the degree of variance was not warranted.

Gall, 128 S.Ct. at 600.

The Court of Appeals also committed another error that this Court had already identified as error in *Gall*: the error of treating any sentence other than incarceration as a mere slap on the wrist. In *Gall*, this Court emphasized that even pure probation is a meaningfully punitive component of a sentence. *Gall*, 128 S.Ct. at 595-96. Here, McVay has been sentenced not only to five years of probation, a fine and

forfeiture; he has also been sentenced to, and has served, six months of home detention.[1] But the Court of Appeals – in both *McVay I* and *McVay II* – simply could not bring itself even to mention the home detention as part of the sentence. The Court of Appeals seems to have been determined to write as though only prison was meaningful punishment, even though this Court had already shown otherwise in *Gall*.[2]

If the Court of Appeals had actually applied the "abuse of discretion" standard of *Gall*, affirmance of the sentence would have been the only plausible outcome. The District Court, as the Government itself admitted in its brief to the Court of Appeals, "carefully reviewed and assessed the § 3553(a) factors at sentencing." (Opening Brief of United States as Appellant, p. 17). Even a brief review of the sentencing transcript, or even only of the quotations we have set forth above, shows that the Government's concession in its brief was correct: the District Court considered the § 3553 factors carefully.

The Court of Appeals reversed only because it thought its own view of those factors was better. The Court of Appeals wrote that the District Court

---

[1] The Guidelines, it may be noted, treat six months of home detention as the equivalent of an equal period of incarceration at level 10. *See* U.S.S.G. §§ 5B1.1, 5C1.1. This makes it all the more inappropriate for the Court of Appeals to have treated the home detention as no punishment at all.

[2] It is also important to note that the Congress chose not to require incarceration for Mr. McVay's offenses. Congress has made that choice for some offenses, but has chosen not to put these offenses in that category. *See* 18 U.S.C. § 3561 (designating those categories of offenses for which probation alone is not permissible). Thus, again, the Court of Appeals was relying on nothing but its own intuition, rather than on any identifiable law or fact about sentencing.

"wholly failed to consider, among other things, the seriousness and full implications of McVay's criminal conduct." That assertion is plainly incorrect if meant literally; if it means anything, it means instead only that the Court of Appeals disagreed with the way that the District Court considered those factors. That is the error identified in *Gall*, committed once again here.

The District Court's view of the § 3553 factors in this case was not only careful; it was eminently sensible. Indeed, the District Court's decision in this case offers a textbook example of a situation in which it is most reasonable for a District Court to deviate somewhat from the Guidelines, in light of the particular facts of the case. Such deviation was most reasonable in this case because the Guidelines give less useful advice here than they do in most cases.

The first reason why the Guidelines' advice is least compelling in this case is that the Guidelines actually do not give any quantified advice at all. In cases where the Government moves for a downward departure because the defendant has substantially assisted the Government, Guidelines § 5K1.1 gives literally no quantified advice about how many levels to depart. There is, furthermore, no way for the Court of Appeals to know what degree of departure most sentencing judges would apply, in a case presenting a similar offense and a similar stellar degree of assistance. We know that the District Court in this case departed down to a level 17, as the Government itself had requested. But we – and more importantly the Court of Appeals – have no way of knowing whether other sentencing courts would tend to depart even more than that, or less, or to the same degree. The Court of Appeals therefore had nothing to judge the

departure or the ultimate sentence against, other than its own intuition. As this Court emphasized in *Gall*, the institutional role and experience of District Courts makes them far better at making this sort of judgment than appellate judges are. *Gall*, 128 S.Ct. at 597-98 & n.7.

The second reason why the Guidelines' advice is least compelling in this case is demonstrated by this Court's opinion in *Kimbrough*. That is, even the pre-departure offense level of 29, in this case, was the sort of non-empirically-derived Guidelines calculation that, under *Kimbrough*, is most ripe for a reasonable variance by a thoughtful sentencing court. This Court recognized in *Gall* and *Kimbrough* that the Sentencing Commission has usually used an empirically-based process that attempts to mirror the mainstream of sentencing judges' decisions. That, in fact, is precisely why the Guidelines advice is usually useful. *Gall*, 128 S.Ct. at 594; *Kimbrough*, 128 S.Ct. at 567, 574 But, the Court recognized in *Kimbrough*, in some areas the Commission has strayed from that empirical focus, preferring instead to rely on its own views rather than following the mainstream of judicial thinking. The Court recognized in *Kimbrough* that, in those areas, sentencing judges have a heightened degree of leeway to vary from the Guidelines and to make their own judgments about what sentence will comport with § 3553. *Kimbrough*, 128 S.Ct. at 575; *Gall*, 128 S.Ct. at 594, n. 2

Just like the "crack" Guidelines in *Kimbrough*, the pre-departure offense level in this case was the product of a non-empirically-derived process. It was not based on any attempt to mirror the mainstream of wise judicial practice. The Sentencing Commission, even at the outset of the Guidelines era, substituted

its own judgment of what sentences ought to be given in fraud cases; it rejected the judgment that was reflected in actual historical sentencing practice. Justice Breyer explained this in The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 18-20 (1988) (describing "the Commission's decision to increase the severity of punishment for white-collar crime" as one of the areas in which "the Commission deviated from average past practice, when, for one reason or another, it wished to modify the typical results which occurred in pre-Guideline sentencing."). And this deviation from the empirical approach has only become more pronounced over time, as the Sentencing Commission has ratcheted the fraud/loss Guidelines steadily upward, based not on empirical study of sentencing practice but on disputable policy judgments. As a former Sentencing Commissioner and a former Commission deputy chief counsel put it,

> The Commission's 1991 organizational guidelines were not the first instance of deviation from both sentencing principles and past practice analysis. In fact, that trend began soon after the initial guidelines, and set a pattern of decisionmaking that has continued over the ensuing decade. Earlier examples date back at least to the 1989 amendments to the robbery and fraud guidelines, both of which involved gratuitous increases in punishment levels that had no basis in either principle or practice, and instead were essentially political decisions reflecting responses to interest group pressures. In the case of the fraud guideline, the pressure came from the Department of Justice, which argued to the Commission that recent media attention to widely-publicized fraud cases, and recent congressional legislation

> that did not in terms call for any increase in average punishment levels, nevertheless had sent a "signal" to the Commission that it must raise those levels. This was the beginning of a purely political mode of operation within the Commission.

Parker and Block, The Limits of Federal Criminal Sentencing Policy: or, Confessions of Two Reformed Reformers, 9 Geo. Mason L. Rev. 1001, 1019 (2001) (footnotes omitted); *see also id.* at 1036 ("the fraud guideline was swept up in the Commission's more general retreat from both principle and past practice, beginning with its 1989 amendment, which is one of the first examples of a gratuitous increase in punishment levels based purely upon interest-group pressure.").

Therefore, there is nothing at all suspect about the District Court's decision to vary downward a few levels from the post-departure advisory Guidelines range.[3] It was entirely reasonable for the District Court to make its own judgment about the § 3553(a) factors based on (among other things) its own assessment of Mr. McVay's particular offense conduct, rather than hewing blindly to the one-size-fits-all advice of a Guidelines calculation. After all, the pre-departure advisory Guidelines level of 29 was overwhelmingly the product of an enormous 26-level enhancement based on the amount of "loss," the very sort of non-empirically-derived decision that *Kimbrough* discussed. *McVay I*, 447 F.3d at 1350. It was, to say

---

[3] The sentence that the two District Judges agreed upon was a level 10 sentence. Thus the variance, viewed in terms of Guidelines levels, was only 7 levels as compared to a pre-departure offense level of 29.

the least, reasonable for the District Court to temper that advice with a fact-specific focus on how McVay's offense conduct was very different from the offense conduct of others in the scheme. As noted in the statement of facts above, McVay's conduct was short and limited – a fact that is practically lost in the Guidelines advice. In exercising judgment to vary from that one-size-fits-all advice, the District Court did what sentencing courts are supposed to do. "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Gall*, 128 S.Ct. at 598.

Even in cases where the Guidelines give more concrete and more useful advice than in this case, a proper application of *Gall* will permit variances at least as large as this one. As noted above, the post-departure Guidelines level – which the Court of Appeals did not question – was 17. At the lowest criminal history level, which is applicable to McVay, this yields an advisory range of 24 to 30 months. [24a]. The variance down to six months of home detention – a sentence at level 10 – was not extreme by any reasonable reckoning.

This was a markedly smaller variance than this Court upheld in *Gall*. Gall's advisory sentence was 30 to 37 months (higher than McVay's), but this Court nonetheless upheld a sentence consisting only of 36 months' probation (whereas McVay received a substantially longer period of probation as well as six months of home detention). *Gall*, 128 S.Ct. at 593. This was also a smaller variance than was upheld, just to take another recent example, in *United States*

v. Thurston, 544 F.3d 22 (1st Cir. 2008) (affirming sentence of three months incarceration, over Government's appeal, where Guidelines offense level was 26 and where the advisory sentence was the statutory maximum of 60 months). Similarly, the variance in this case was analogous to the variance upheld in *United States v. Howe*, 543 F.3d 128 (3rd Cir. 2008) (affirming sentence of three months' home confinement and two years' probation with no fine or forfeiture, over Government's appeal, where advisory Guidelines range was 18 to 24 months). As another example, there is *United States v. Gardellini*, ___ F.3d ____, 2008 U.S. App. LEXIS 23911 (D.C. Cir. 2008) (affirming sentence of no incarceration and no home detention, over Government's appeal, where the advisory range was 10 to 16 months). *Gardellini*, like *Thurston* and *Howe*, represents the correctly deferential approach to appellate review; it is an approach that is wholly different from the approach taken by the Court of Appeals in this case.

The decision below represents a stark conflict with *Thurston*, *Howe*, and *Gardellini*. Even though one can always find some uniqueness about any particular set of facts in an attempt to distinguish one appellate sentencing case from another, it remains true that these cases are irreconcilable in their fundamental approach to appellate review.

The decision below is, similarly, in conflict with *Gall* itself. And again, *Gall* was a case where there was actual concrete, and empirically-derived, Guidelines advice that gave a sense of how the sentence compared to the mainstream of judicial thought. Here, as we have said, the Court of Appeals did not even have the benefit of that sort of good Guidelines advice.

In short, the decision of the Court of Appeals in this case bears no resemblance to the post-*Booker* sentencing scheme as this Court has described it. The Court of Appeals in this case was not even purporting to guide District Courts in future cases; thus the decision of the Court of Appeals cannot even be defended as having been an effort to ensure some heightened degree of sentencing uniformity. On the contrary, by making its decision "non-published," the Court of Appeals sought merely to exercise power over the sentence for this particular individual, based not on any identifiable principle of law or empirically-derived fact, but instead based only on the gut feeling that he ought to be incarcerated. The Court of Appeals has mistaken the proper boundaries of its institutional role in sentencing. The role of the Court of Appeals is not to create an *ad hoc* mandatory minimum sentence, where the Congress has not done so and where the Sentencing Commission has not even given quantified or empirically-derived advice. The role of the Court of Appeals is not to follow its own intuition, at the expense of the judgment and experience of the sentencing court. The decision below is so blatantly erroneous that this Court should summarily reverse; but if there is any doubt, the Court should grant full review to clarify the nature of "substantive reasonableness" review after *Gall*.

CONCLUSION

For the foregoing reasons, this Court should either summarily reverse, or grant review and set the case for briefing and argument.

Respectfully submitted,

THOMAS J. SPINA
FAWAL & SPINA
1330 21st Way South
Suite 200
Birmingham AL 35205
(205) 939-1330

SAM HELDMAN *
THE GARDNER FIRM, PC
2805 31st St. NW
Washington, DC 20008
(202) 965-8884

* Counsel of Record